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Supreme Court, U.S.
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No.

# In the Supreme Court of the United States

OCTOBER TERM, 1999

RENE M. DARBY,

and

DIRECTOR,

OFFICE WORKERS' COMPENSATION PROGRAMS,
Petitioner,

vs.

INGALLS SHIPBUILDING, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**APPENDIX TO PETITION FOR WRIT OF CERTIORARI**

BLEWETT W. THOMAS
PO Box 542237
Houston, Texas 77254
(713) 942-8771
*Counsel for Petitioner,*
*Rene M. Darby*

Riverside Printing, L.L.C., 4939 Tchoupitoulas, N. O., LA 70115, (504) 897-5000

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**APPENDIX A**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60029

Filed June 11 1999

RENE M DARBY; DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR

Petitioners

v.

INGALLS SHIPBUILDING, INC., Self -Insured Employer

Respondent

---

Petition for Review of an Order of the
Benefits Review Board

---

Before SMITH, DUHE, and BARKSDALE, Circuit Judges
BY THE COURT:

IT IS ORDERED that the motion of petitioner for award of attorney's fees is **DENIED.**

IT IS FURTHER ORDERED that the motion of respondent for leave to file a response to the petitioner's reply to the motion for award of attorney's fees, is **GRANTED.**

**APPENDIX B**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60029

Filed Jul 13 1999

RENE M DARBY; DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U S DEPARTMENT OF LABOR

Petitioners

v

INGALLS SHIPBUILDING-INC, Self-Insured Employer

Respondent

Petition for Review of an Order of the
Benefits Review Board

Before SMITH, DUHE and BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that petitioner's motion for reconsideration of this court's order of June 11, 1999, is **DENIED.**

**APPENDIX C**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60029

Filed Aug 19 1999

RENE M DARBY; DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U S DEPARTMENT OF LABOR

Petitioners

v.

INGALLS SHIPBUILDING INC, Self-Insured Employer

Respondent

- - - - - - - - - - - - - - - - - - - - -

Petition for Review of an order of the
Benefits Review Board

- - - - - - - - - - - - - - - - - - - - -

O R D E R:

IT IS ORDERED that the motion of petitioner, Rene M. Darby, for leave to file petition for en banc consideration of the court's order of July 13, 1999, is **DENIED.**

/S/ Jerry E. Smith

JERRY E. SMITH
UNITED STATES CIRCUIT JUDGE

**APPENDIX D**

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 99-60567

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RENE M. DARBY

Petitioner

vs.

INGALLS SHIPBUILDING, INC; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, US DEPARTMENT OF LABOR

Respondents

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Petition for Review of an Order of the Benefits Review Board

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Before SMITH, BARKSDALE and PARKER, Circuit Judges

BY THE COURT:

IT IS ORDERED that the motion of the petitioner for leave to file a rebuttal to the respondent's reply to petitioner's response to respondent's motion to dismiss the petition for review as frivolous is **DENIED AS MOOT.**

IT IS FURTHER ORDERED that the motion of the respondent Ingalls Shipbuilding Inc. to dismiss the petition for review as frivolous is **GRANTED**.

FILED: December 2, 1999

## APPENDIX E

**DARBY V. INGALLS SHIPBUILDING, INC.**
**Cite as 99 F.3d 685 (5th Cir. 1996)**

**Rene M. DARBY and Office of Worker's Compensation Programs, United States Department of Labor, Petitioners,**

**V.**

**INGALLS SHIPBUILDING, INC., a Self-Insured Employer, Respondent.**

**No. 96-60029**
**Summary Calendar.**

United States Court of Appeals,
Fifth Circuit.

Nov. 13, 1996.

Following injured worker's return to employment, he sought permanent total disability compensation under the Longshore and Harbor Worker's Compensation Act (LHWCA), alleging that post-injury position to which he was assigned by employer did not constitute suitable alternative employment, and that he was entitled to additional medical benefits. Administrative law judge (ALJ) awarded claimant various additional medical and compensation benefits, but found that modified joiner position to which claimant was assigned after his return was suitable alternative employment. The Benefits Review Board affirmed

ALJ's order, and claimant petitioned for review. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) employer's offer of suitable job within partially disabled claimant's current place of work was sufficient to discharge its burden of establishing suitable employment, and employer was not required to prove that job was realistically and regularly available to claimant on the open job market; (2) substantial evidence supported Board's conclusion that employment of claimant in modified joiner position was sufficient to discharge employer's burden under the LHWCA of showing availability of suitable employment; (3) claimant did not establish that modified joiner position was improper on ground it constituted "sheltered employment"; and (4) failure of ALJ to make finding that claimant's actual post-injury earnings fairly and reasonably represented his wage-earning capacity required remand for finding.

Petition granted; affirmed in part; vacated and remanded in part.

---

Blewett William Thomas, Gulfport, MS, for Darby.

Mark Ambrose Reinhalter, Office of the Solicitor of Labor, Washington, DC, Thomas O. Shepherd, Jr., Clerk, Benefits Review board, Washington, DC, Carol DeDeo, Assoc. Solicitor, United States Department of Labor, Dir., Office of Workers Comp. Programs, Washington, DC, for Director, Office of Worker's compensation Programs, U.S. Department of Labor, petitioner.

Paul B. Howell, Richard P. Salloum, Franke, Rainey & Salloum, Gulfport, MS for respondent.

Petition for Review of an Order of the Benefits Review Board.

Before SMITH, DUHE' and BARKSDALE, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Rene Darby petitions for review of a decision of the Benefits Review Board ("BRB") affirming an order by an administrative law judge ("ALJ") consisting of a Decision and Order Awarding Additional Benefits, all pursuant to the Longshore and Harbor Workers' Compensation Act (the "Act"), as amended, 33 U.S.C. § 901 et seq. We grant the petition in part and vacate and remand in part.

I.

Darby was employed by Ingalls Shipbuilding, Inc. ("Ingalls"), as a joiner and. during the course of this employment, was Injured when he slipped and fell down a flight of stairs. He underwent medical treatment for the sustained injuries, during which time Ingalls paid temporary total disability benefits. Darby returned to work nine months later in the same position and transferred to a different department for a short period of time before returning to the joiner department and later being laid off because of a lack of work.

In October 1990, nearly three years after his accident, Darby returned to Ingalls as a joiner. Because of his physical limitations. however, he was assigned to a modified joiner position with restrictions on his responsibilities to lift and push heavy objects. Darby was instructed by his super-

visor that he was to work within the scope of his restrictions but that he could exercise his own judgment where appropriate. Darby worked without incident in this new capacity for approximately one year.

Following his return, Darby sought permanent total disability compensation under the Act, alleging that his post-injury position at Ingalls did not constitute suitable alternative employment (§ 908(a)) and that he was entitled to additional medical benefits (§ 914(e)). After administrative procedures failed to resolve the parties' differences, an ALJ held a formal hearing on October 2, 1991, and awarded Darby various additional medical and compensation benefits. Of particular consequence to this appeal, however, is the ALJ's finding that Darby's modified 'Joiner position was suitable alternative employment.

II.

[1] We review BRB decisions for errors of law and adhere to the substantial evidence standard that governs the BRB's review of the ALJs factual determinations. *See Odarn Constr. Co. v. United States Dept of Labor*, 622 F.2d 110, 115 (5th Cir.1980), *cert. denied*, 450 U.S. 966, 101 S.CT. 1482, 67 L.Ed_2d 614 (1981). Thus, we must affirm BRB decisions that conclude correctly that the ALJ's findings are supported by substantial evidence and are in accordance with the law. *See O'Keefe v. Smith, Hinchman & Grylls Assoc., Inc.*, 380 U.S. 359. 362--63, 85 S.Ct. 1012, 1014-15, 13 L.Ed.2d 8915 (1965).

A.

[2] Darby first argues that the BRB erred in relying upon

the modified joiner position to establish the availability of suitable alternate employment. According to Darby, an employer should be required to prove that a job offered as suitable alternative employment is realistically and regularly available to the claimant on the open job market. In so suggesting, Darby reads our decision in *P & M Crane Co. v. Hayes*, 930 F.2d 424, 430 (5th Cir.1991), (i) to permit a single job offer to discharge the employer's burden only where the claimant is highly skilled and seeking specialized employment in an area where the number of suitable applicants is small and (ii) to require a demonstration of availability on the open job market where the claimant, as in the instant case, is less skilled.'

We need not decide whether *P & M Crane* should be so construed, as it is inapposite to the instant case. *P & M Crane* dealt with claimants who alleged permanent and total disabilities and whose employers proffered allegedly suitable jobs external to their current place of work, whereas Darby suffers from a partial disability only and was offered a new job within his current place of work. See id. at 427. The BRB has opined, with respect to partial disability cases, that an employer's offer of a suitable job within the partially disabled claimant's current place of work is sufficient to discharge its burden of establishing suitable employment; the employer need not show that the claimant can earn wages in

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1. Darby notes correctly that *Diosdado v. John Bludworth Marine*, No. 93-05422, 37 F.3d 629 (5th Cir. Sept. 19, 1994) (unpublished), hinted at such an interpretation of *P & M Crane*. but *Diosdado* is factually distinct From the instant case. In *Diosdado*, the claimant was offered a single job external to his current employer, and the employer had failed to demonstrate that the claimant had any reasonable likelihood of obtaining that job. Absent such a showing by the employer, we were not convinced that the employer has discharged his burden adequately.

in the open market. *See Darden V. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986).

[3] *P & M Crane* did not disturb, and, in fact, cited approvingly the Darden holding. See *P & M Crane*, 930 F.2d at 430. Hence, we find no error in the BRB's conclusion that Ingalls's employment of Darby in the modified joiner position was sufficient to discharge its burden of showing availability of suitable employment.

Properly characterized, Darby's challenge to the modified joiner position thus becomes one of the suitability of the position with respect to his physical constraints. In support of its finding of suitability, the BRB noted that Darby had been granted wide latitude by Ingalls to determine his physical capabilities and to perform his duties in connection with such determinations and that Darby had been instructed to report any conflicts between an assigned job task and his work restrictions to his supervisor. *See Rene W. Darby v. Ingalls Shipbuilding, Inc.* No. 91-LHCA-0049 (Dep't Labor 1992), at 3. The BRB also found sufficient evidence that, to the extent Darby was in fact performing work in excess of his physical limits as suggested by his physicians, he was doing so on his own accord. Id. Finally, the BRB was influenced by Darby's satisfactory performance of his modified job responsibilities for approximately one year prior to the hearing and the juxtaposition of his complaints in close proximity with the ALJ hearing. Id.

The record reveals that the BRB's review of the ALJ's factual findings 'is supported by substantial evidence, and we decline to disturb any credibility inferences. *See Mendoza v. Marine Personnel Co.*, 46 F.3d 498, W (5th Cir-1995) (noting that "[t]he ALJ is the factfinder and is entitled

to consider all credibility inferences.' The ALJs selection among inferences is conclusive if supported by the evidence and the law. The ALJ determines the weight to be accorded to evidence and makes credibility determinations.") (citations omitted).

B.

[4] Darby next argues that the modified joiner position is improper because it constitutes "sheltered employment." Darby points us to the cross-examination testimony of Carl Robinson, Darby's immediate supervisor, in which Robinson answered in the negative Darby's question whether, if Darby were to leave, he would "advertise the position as a light duty joiner to be filled." Darby so interprets Robinson's answer to mean that, were Darby to leave, the position would not be filled at all and urges us to marshal this "compelling evidence" toward the conclusion that "the Employer created this position for the sole and express purpose of escaping liability to the Claimant for his neck and back injuries."

Not only is Darby's interpretation of Robinson's answer questionable, but the remaining eight pages of Robinson's testimony on cross-examination undermines Darby's ultimate conclusion. First, Darby's question of Robinson asked only whether, if Darby were to leave, Robinson would *advertise* Darby's position as a "light duty joiner," not whether Robinson would hire an employee to complete the duties formerly executed by Darby. Robinson's manner of advertising a vacant position does nothing to support Darby's sheltered employment claim. Furthermore, Robinson's remaining testimony makes apparent the

frequency with which joiners work under various restrictions.[2] That the joiner work was tailored to Darby's physical limitations is insufficient to support Darby's contention that the position was sheltered. See *Darden*,18 BRBS at 226. Rather, we find substantial evidence to support the BRB's review of the ALJs finding that Darby's position was part of the regular work performed by his department.

C.

[5,6] Finally, Darby asserts that the ALJ failed to make a finding under 33 U.S.C. § 908(h) that Darby's actual post-injury earnings "fairly and reasonably represent his wage-earning capacity." Under 33 U.S.C. § 908(c)(21), an award for permanent partial disability is based upon the difference between claimant's pre-injury average weekly wage and his post-injury wage earning capacity. The ALJ is permitted to approximate a claimant's wage-earning capacity by using his post-injury actual wages, but only if such actual earnings fairly and reasonably represent his wage-earning capacity. See *Develier v. National Steel & Shipbuilding Co.*. 10 BRBS 649, 660 (1979). Although the BRB said that the ALJ found that Darby's post-injury earnings were representative of his wage-earning capacity, *see Darby* at 5, we find no such determination in the ALJ's decision. Accordingly, we vacate and remand for a finding consistent with § 908(h).

The petition for review is GRANTED, and the decision of the BRB is AFFIRMED in part and VACATED and REMANDED in part.

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2. Robinson noted: "That happens all the time, though you know, like you have guys that come in, they have a restriction, you know, I done seen that before."

## APPENDIX F

**U.S. Department of Labor**
**Office of Administrative Law Judges**
**Heritage Plaza, Suite 530**
**111 Veterans Memorial Blvd.**
**Metairie, LA 70005**
**(504) 589-6201**

| | | |
|---|---|---|
| In the Matter of | | |
| RENE DARBY, Claimant, | **Case Nos..** | **91-LHC49**<br>**97-LHC-1556** |
| against | **OWCP Nos.** | **06-110624**<br>**06-145508** |
| INGALLS SHIPBUILDING, INC., Self-Insured Employer. | | |

**APPEARANCES:**

**BLEWETT THOMAS, ESQ.**
Post Office Box 12484
San Antonio, Texas 78212
On Behalf of the Claimant

**PAUL B. HOWELL, ESQ.**
Franke, Rainey & Salloum, P.L.L.C.
2605 14th Street
Gulfport, Mississippi 39501
On Behalf of the Employer

**BEFORE: RICHARD D. MILLS**
Administrative Law Judge

## DECISION AND ORDER AWARDING COMPENSATION BENEFIT'S

This is a claim for compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et. seq., (hereinafter called "the Act") and the governing regulations thereunder. This claim was filed by Rene Darby ("Claimant"') against Ingalls Shipbuilding Incorporated "Employer"). The present claim consists of two OWCP claims. The first and original claim arises out of a 1987 injury suffered in the course of employment with Employer. The original claim was tried before an Administrative Law Judge (ALJ) in 1991. The Decision and Order in that case granted Claimant partial relief but denied permanent total disability. The denial of permanent total disability was appealed to both the Benefits Review Board and the Fifth Circuit Court of Appeals. The original claim is again before the Office of Administrative Law Judges pursuant to the Order entered by the Fifth Circuit on November 13, 1996, in which it was found that the previous ALJ had failed to make a specific determination as to Claimants post-injury wage earning capacity. The second claim arises out of a May 8, 1992 injury which Claimant suffered while working at Employer's facility after his return to a modified work position.

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for resolution. Pursuant thereto a formal hearing was held on Tuesday, December 9, 1997, in Gulfport, Mississippi. All parties were afforded a full opportunity to adduce testimony, offer evidence and submit post hearing briefs.

Post-hearing briefs were received from both parties. Based upon the stipulations of Counsel, the evidence presented, and my observations of the demeanor of the witnesses, I make the following findings of fact, conclusions of law and order.

## STIPULATIONS

The Parties have stipulated as follows:

(1) Jurisdiction is not a contested issue as Claimant was employed
as a joiner in the construction of naval vessels;

(2) The date(s) of injury/accident are September 24, 1987 and May
8. 1992;

(3) The injuries were in the course and scope of employment;

(4) There was an Employer/Employee relationship at the time of
accident;

(5) Employer was advised of the injuries on 9/24/87 and 5/8/92;

(6) Notices of Controversion were filed on 7/11/88 and 9/8/92;

(7) No informal conference was held;

(8) The average weekly wages at the respective times of injury were $411.20 (9/24/87) and $412.51 (5/8/92);

(9) Medical Benefits have been paid;

(10) Dates of maximum medical improvement are 10/29/90 and 12/14/95;

(11) Benefits paid:

(a) Injury of 9/24/87
TTD: 4/7/89 through 10/28/90 at $274.13 per week;
PPD: 15% to arm for 46.8 weeks at $274.13 per week;

(b) injury of 5/8/92 TTD: 5/12/92 through 10/2/92 at $275.01
2/22/95 through 1/23/96 at $275.01 8/6/96 through 8/4/97 at $275.01.

**ISSUES**

The following issues are in dispute:

(1) Nature and extent of disability, if any;

(2) Whether Claimant's post injury wage in 1990 fairly and reasonably represented his wage earning capacity following the 1987 injury;

(3) Employer's entitlement to Section 8(f) relief,

(4) Separation of claims;

(5) Attorney's fees;

(6) Sanctions;

## FACTS

### Background of Prior Claim

On July 17, 1987, Claimant was hired by Employer as a joiner. While working in that capacity Claimant slipped and fell down some stairs, injuring his elbow and his neck. Claimant was treated by Drs. Warfield, Bishop, Ross, Buckley, Bazzone, Bridges, and Danielson for the effects of his injuries. His treatment included u1nar nerve surgery on his left elbow by Dr. Bishop and repeat left elbow surgery by Dr. Bazzone. Claimant also had an anterior cervical diskectomy and fusion at C4-5 and C5-6 performed by Dr. Bazzone. Claimant was assigned a 15% permanent partial disability to the arm as a result of the elbow condition, and a 10% anatomical impairment due to the cervical condition. Claimant was seen by Dr. William Bridges for an' independent medical evaluation at the request of the Department of Labor. Dr. Bridges concluded that Claimant reached-maximum medical improvement on August 13, 1990, and was restricted from lifting over 30 pounds, performing overhead work for extended periods of time, and from work requiring constant head and neck motion. (EX-27).

During 1990, Claimant continued to complain of numbness in the fingers of his left hand, as well as complaints of back, neck, and upper extremity pain. Claimant sought treatment from Dr. Harry Danielson. Dr. Danielson found that Claimant's reflexes in the upper extremities to be abnormal, which led him to believe that Claimant might have a disk

problem at C6-C7. A subsequent MRI performed on Claimant's thoracic spine on July 25, 1990 led to the diagnosis by Dr. Danielson that Claimant was suffering from a bulging disk at T6-T7. (EX-27). In his deposition, Dr. Danielson drew a causal relationship between Claimant's thoracic back condition and his September 24, 1987 injury. Dr. Danielson believed that Claimant's thoracic spine condition could be treated conservatively and that surgery was not necessary. Moreover, he though that Claimant could remain in his light duty job. He stated that occasional extension and overhead work would be permissible, provided it was not repetitive activity performed all day. As of September 23, 1991, Dr. Danielson assigned a 20-25 percent permanent partial impairment to Claimant's left arm and a 10-15 percent permanent partial impairment to the whole person relative to the two levels in Claimant's back that were fused. Finally, he assigned a 5 percent permanent partial impairment to the whole person for Claimant's thoracic spine condition. Dr. Danielson also admitted that there was a possibility that Claimant's thoracic spine could degenerate further. (EX-27, pp. 8-9).

A functional capacities evaluation was performed in 1990 by Ms. Joan Sapp. The evaluation determined that Claimant was only able to perform light duty work. Ms. Sapp stated that Claimant could lift up to 20 pounds from the floor to his waist, up to 15 pounds from his waist to his shoulder, he could push/pull up to 50 pounds and he could carry 30 pounds. Ms. Sapp noted that Claimant showed good ability to squat, walk and climb stairs. Ms. Sapp opined that Claimant's maximum weight capacities were not compatible with the Department of Transportation's definition of joiner work, which it classified as medium level work. Specifically, medium level work requires the

ability to lift 50 pounds occasionally and 25 pounds frequently. Ms. Sapp also noted that Claimant should be restricted to crawling only 30 feet at one time, he should limit his overhead work, and he should be permitted to alternate positions frequently. Ms. Sapp concluded that she did not believe that Claimant could return to his former job as a joiner. (EX-27).

At the original hearing of October 2, 1991, Claimant stated that he was currently working the same number of hours as he had before he was injured. Claimant also stated that he was earning more money ($12.28 per hour) than he had been before his injury ($10.28 per hour). Claimant also acknowledged that he had good attendance and had not received any disciplinary notices for poor work since returning to work on October 29, 1990. (EX-27, p. 11).

Claimant returned to work with Employer in a modified joiner position on October 29, 1990. Claimant was instructed not to perform activities outside of his limitations. Mr. Carl Robinson, Claimant's supervisor at that time, testified at the original hearing. Mr. Robinson stated that he was shown Claimant's restrictions on his return to work although the only limitation he saw regarded the lifting restriction. Mr. Robinson stated that he learned of the overhead work restriction from Mr. Joe Walker, a vocational rehabilitation counselor. Mr. Robinson testified that he told Claimant that he would place him in the field working with the rest of the crew, but within the scope of his restrictions. Claimant stated that although Mr. Robinson was aware of his restrictions, he still received assignments which required activity above those limitations. Mr. Robinson stated that he and Claimant had a positive working relationship and that he had no complaints about the quantity or quality of Claimant' work. Mr.

Robinson believed that he had suitable work for which Claimant was capable of performing. (EX-27, pp. 11-12).

Mr. Joseph Walker, a vocational rehabilitation counselor, provided an assessment of Claimant's employment opportunities and capabilities. Mr. Walker met with Claimant on November 6, 1990. Mr. Walker reviewed the medical records of Dr. Bridges and Dr. Danielson, as well as Claimant's functional capacities evaluation. Based on Claimant's age, education, vocational background and medical limitations, Mr. Walker believed that Claimant could continue working as a Joiner in the modified capacity arranged for by Employer. Mr. Walker was also retained by the Department of Labor, as part of its OWCP Rehabilitation Division, to monitor Claimant's progress in Employer's return-to-work program. Mr. Walker informed the Department of Labor that Employer had identified suitable work activity for Claimant for his return to work withing his old department and within his craft, albeit in a modified capacity.

**Background of Present Claim**

Claimant is currently 33 years old, married, and has four children. Claimant stated that he had done some woodworking in high school and before his employment with employer he had worked for Redman Homes for approximately three and a half years. (Tr. pp. 62-63). During his employment with Redman Homes, Claimant did finishing work and plumbing inspections. (Tr. p. 63).

Claimant stated that when he returned to work for Employer in 1990 he was working as a "joiner," which was a position in which he would construct interior walls, bulk

storage areas, and curtain plate. Claimant worked in that capacity for approximately two years. Claimant stated that he was re-injured in May of 1992 while working in a capacity similar to that of a joiner. Claimant stated that he was doing the work of a tack welder in the hull. At that time, Claimant had restrictions of limited use of his left arm, no lifting over 30 pounds, and no overhead work. (Tr. p. 65). Prior to 1992, Claimant stated that he only exceeded these restrictions one time, when he was working with Carl Robinson installing curtain plating. (Tr. p. 66).

On May 8, 1992, Claimant stated that he was pulling a welding line through a ship when he was caused to twist suddenly, which created a burning sensation through his head and neck and all through his arm. Claimant recalls falling to his knees and informing Mr. Richard Gibson that he had been injured. Claimant was taken to the infirmary at Employer's facility and then pulled out of work pending an appointment with Dr. Danielson. (Tr. p. 68). Claimant testified that he went to see Dr. Danielson, who prescribed therapy. Claimant recalls undergoing the rehabilitation therapy and then being released to return to work. Claimant returned to work in October of 1992 and was employed installing bunks on a ship. (Tr. p. 70). Claimant stated that the work of installing bunks included the drilling the pop rivets, which aggravated his arm. Claimant stated that even though this aggravated his previous injury, he stayed with it and as a result, never had a problem with supervisors or never got in trouble for missing work. Claimant was under the impression that he would have pain for the rest of his life and needed to find ways to cope with it. (Tr. p. 70).

Claimant stated that he was chosen as a leadman for a different project. According to Claimant, Mr. Vince Moran

chose him as a leadman partly because he knew that Claimant's arm and hand were bothering him and he would not have to do as much manual work. (Tr. pp. 71-72). Claimant testified that he worked through to the end of this project but his arm was starting to hurt and his hand would become numb to where he had difficulty holding on to a coffee cup. (Tr. p. 72). Claimant eventually went to see Dr. Danielson again on February 7, 1995, who scheduled him for an MRI. Claimant underwent the MRI and when the results came back in, Dr. Danielson again pulled him from work and scheduled Claimant for a myelogram. According to Claimant, Dr. Danielson recommended surgery. Claimant stated that he went to Dr. Smith for a second opinion and Dr. Smith concurred with Dr. Danielson on the need for surgery. Claimant stated that he went ahead and had the surgery and when he was done with the healing process, he returned to work, which was in January of 1996. (Tr. p. 74).

Claimant stated that he was returned to work doing layout work behind the pin shooter. Claimant stated that this job required him to climb over beams to mark things. Claimant stated that he could not physically handle this job and whet to Mr. Bill Thompson, the foreman of the insulation crew and told him so. Claimant also stated that he had an allergic reaction to the insulation for which he was sent to a dermatologist to have checked. Claimant alleges that Employer has never paid the bill for the visit to the dermatologist. (Tr. p. 119). After attempting the insulation job, Claimant stated that he was then sent to "roll tape." Claimant stated that he proceeded to do this job for approximately seven months, when it began to aggravate his condition, at which time he mentioned it to his supervisors. (Tr. pp. 76, 121). After mentioning it three times, Claimant was sent to Employer's infirmary and from there was sent to Dr. Danielson who again

pulled Claimant from work. (Tr. p. 76). Claimant stated that he underwent nerve conduction studies with Dr. Lew who gave him injections. Claimant then returned to Dr. Danielson after obtaining minimal relief with the injections. According to Claimant, he was told by Dr. Danielson that there was nothing more that could be done and he should stay out of the shipyard. (Tr. p. 77).

According to Claimant, he left the shipyard but was later contacted by Ms. Melinda Wiley who told Claimant that there were jobs available to him at Employer's facility. Claimant stated that he was told that there was a job available pulling tape. Claimant stated that he took Dr. Danielson to the facility to show him the tape pulling job and Dr. Danielson concurred with Claimant that the job would aggravate his injury. Claimant testified that after that he did not return to Employer's facility and his benefits were cut off. (Tr. pp. 77-78). Regarding the tape roller job, Claimant stated that the reason the job aggravates his condition is because of the constant pressure from pulling the tape up to the head area. (Tr. p. 97).

Regarding a surveillance tape taken of him during a Mardi Gras parade where he was throwing beads from a float, Claimant admitted that he was riding on the float and throwing beads but he also stated that he only had to reach and grasp beads that were hanging on hooks directly in front of him and that he did not throw the beads on a repetitive basis. Claimant stated that during the second half of the parade he started hurting and sat down. (Tr. pp. 105-106).

Claimant recalled that after deciding not to return to work with Employer he was hired by a friend to be a ground man for an antenna construction. Claimant stated that when he took the job he understood that it was a one-time thing.

(Tr. p. 78). Claimant stated that he made approximately $2300.00 on the job. (Tr. p. 79). Claimant testified that while he was working that job, his niece and nephew moved into a trailer home built by Grand Housing. Claimant was asked to look at the mobile home and when he did, he found it was not set up right. Claimant then contacted Grand Housing about the problems and was, as a result of his in-depth knowledge on the homes, was asked if he would "trim out' houses for them. Claimant agreed and recruited a crew to do the work. (Tr. p. 80).

Claimant stated that with his business, the crew does most of the work and he does not work if he feels like he cannot do it that day or if he feels tired, or if his back starts to hurt. Claimant stated that he sees a chiropractor on a regular basis as that is what was recommended by Dr. Danielson. According to Claimant, he has no intentions of returning to Employer's employ under any circumstances. Claimant stated that his wife would divorce him if he returned. (Tr. p. 81).

Claimant stated that none of his expenses were reimbursed to him by Grand Housing. According to Claimant, he pays himself $250.00 per week from the profits his business earns. Claimant stated that any money that is left over after he pays his employees and himself is reinvested back into the company. Claimant testified that he has so far reinvested $3,395.25 back into the company. Claimant stated that he has bought air guns, generators, and air compressors. (Tr. pp. 131-132). Claimant stated that he will soon have additional expenditures in the form of liability insurance, medical coverage, additional taxes, and the hiring of an accountant. (Tr. pp. 110- 111).

Claimant reviewed a listing of jobs sent to him by Mr. Walker on September 30, 1997. (Tr. p. 85) Claimant stated that the job of "task activity layout work" involved laying out pins that are shot into the walls and ceiling. Claimant testified that he did this job before he started rolling tape and the job involved climbing over various things, which Claimant found that he could not do. (Tr. p. 86). The second job sent to Claimant was that of "bulkhead insulator." Claimant stated that this job was basically no different that "layout" and entailed climbing over various beams and equipment. The third position identified to Claimant was "insulation runner" which entailed unloading a truck full fireproof insulation and stacking them in the warehouse, after which a worker would distribute the material throughout the shipyard by putting six to twelve cases of insulation on a buggy and puffing them throughout the shipyard. Claimant stated that the cart he would be required to pull was heavy and that the man who was doing the job when he was there was under no restrictions. (Tr. pp. 87-88). The fourth position identified was that of "insulation tape seam applicator." Claimant stated that the job required the worker to bend constantly to get underneath beams. Claimant further stated that the job also requires constant use of the hands which he cannot do. (Tr. p. 89).

According to Claimant, he has problems using screwdrivers and hand tools, which he attributes to the effects of multiple neck surgeries on the nerves in his neck. Claimant stated that both his hands will go numb. (Tr. pp. 89-90). The fifth position identified was that of insulation panel cutter. Claimant stated that the job entails cutting insulation panels with a razor knife. Claimant stated that he could do this job, but not on an everyday, all-day basis, as his hands go numb and cramp when using tools. (Tr. p. 90). The sixth position

identified was that of "DC board holder" installer. Claimant stated that this is a job that is only done when a ship is being finished and hence, it is not a job that is done every day throughout the shipyard. Claimant also stated that the job requires constant climbing of the stairs to every compartment. (Tr. pp. 90-91). The seventh position is that of "furniture refinisher' in the trim shop. Claimant testified that this job entails the constant use of drills and sanders. (Tr. p. 91).

Claimant testified that overall, there is no job in the shipyard that he can do on a eight-hour a day, 40 hour per week basis, because there are days when he cannot work as his hands are in significant pain and his neck is restrictively stiff. (Tr. p. 123). Claimant stated that he will not go back to work for Employer, but that he does not want to live off the "system" either, so he will continue to run his own business until there are no more homes to be sold or Grand Housing goes out of business. (Tr. p. 125).

Claimant was also deposed on November 5, 1997. During that deposition, Claimant explained his physical limitations. Claimant stated that on occasion he can work or stack overhead, but he cannot do it on a continual basis. Claimant stated that he could not look up for a prolonged period of time where he was bending his head back. Claimant stated that he can do some ladder climbing but he could not work on a ladder for an extended period of time. Claimant felt that he could do some activities where it required bending, as long as that bending was not constant. Claimant stated that he could often stoop or squat, but not constantly. Claimant stated that he is able to sit for medium periods of time and could stand for long periods of time. (EX-56, pp. 66-67).

Regarding his new company, Claimant stated that, on average, he makes about $250.00 per week. However, Claimant stated that the amount of work every week win vary, so some weeks he will make more than $250.00, and other weeks he will make less. (EX-56, p. 59).

Ms. Barbara Melinda Wiley testified in this matter. Ms. Wiley has worked for Employer for approximately 24 years. Presently, Ms. Wiley woks as the Employee Relations Representative and her duties include assisting people that have been injured at work to get back to work. (Tr. p. 152). Ms. Wiley stated that Claimant, should he return to work, would be accommodated to the best of her ability within the restrictions that his doctor has outlined for him. Ms. Wiley stated that Claimant would be returned to the same classification that he had when he left and Claimant would receive the same hourly rate or greater than when he had left. (Tr. p. 155). Regarding the jobs sent to Claimant that would be available should Claimant return to work for Employer, Ms. Wiley stated that those jobs were more complicated than the tape-rolling job but were not necessarily more difficult. Ms. Wiley stated that she was aware that Dr. Danielson rejected the tape-rolfing job due to its repetitive nature. (Tr. p. 159). Ms. Wiley stated that Claimant, at the time of the report setting forth the available positions, did not meet the criteria to be returned to work as a work leaderman. (Tr. p. 159). Ms. Wiley stated that after August 4, 1997, Claimant was sent a letter asking him to report for an interview. Ms. Wiley stated that Claimant did not report for the interview. (Tr. pp. 165-166). Ms. Wiley stated that Employer continues to have work available for Claimant. (Tr. p. 171).

Mr. Joseph Walker testified in this matter. Mr. Walker is a certified vocational rehabilitation counselor as well as a

certified rehabilitation counselor with the Department of Labor and a contract vocational expert with the Office of Hearing and Appeals of the Social Security Administration. Mr. Walker stated that he was aware of the types of work that would be offered Claimant as well as the restrictions that would be applicable. (Tr. pp. 173-175). Mr. Walker stated that, regarding Claimant's alleged allergies to the fiberglass insulation, the insulation now being used is known as polymide insulation that should not affect Claimant. (Tr. p. 177). Mr. Walker opined that Employer did have suitable alternative jobs available for Claimant within the joiner/insulator department. (Tr. pp. 178, 181). Mr. Walker also stated that the jobs identified would be modified to allow Claimant to perform within his restrictions from a safety standpoint. (Tr. p. 180). Mr. Walker clarified that the jobs identified were modified tasks or functions within the context of the joiner/insulator position and were not specific and permanent jobs. (Tr. p. 18 1). Rather, they were tasks that a person may be assigned to perform one week and then that person may be assigned an alternative task the next week. (Tr. p. 182).

Dr. Harry A. Danielson was deposed on November 3, 1997. Dr. Danielson had previously been deposed regarding the prior claim on September 21, 1991. Dr. Danielson stated that on December 14, 1995, Claimant had reached maximum medical improvement from his cervical fusion. At that time, Dr. Danielson opined that Claimant was vulnerable to repeat injury and should be employed in a light-duty supervisory capacity. Dr. Danielson opined that shipwork was not suitable for Claimant because the working conditions were such that a person was always subject to bumping his head and overhead working was not in Claimant's best interests. (EX-43, p. 9).

Regarding Claimant's employment as a tape roller, Dr. Danielson stated that he viewed a video of the task and, at that time, understood why Claimant became symptomatic from engaging in that activity. Dr. Danielson stated that Claimant could not do that particular job as the activity it entailed aggravated his symptoms. Dr. Danielson stated that the constant repetitive motion caused Claimant strain in the thoracic outlet of his neck. (EX43, p. 11).

Dr. Danielson stated that, regarding post cervical fusion pain from a three level cervical fusion, the amount of pain varies with the patient and the amount of repetitive activities, ranges of motion, and sudden twists. Dr. Danielson stated that looking overhead for long periods of time can be painful. Dr. Danielson stated that motivation will also play a role, as wen as secondary gain, litigation, neurosis, and addictive behavior. Dr. Danielson stated that he attempts to gain an understanding of the patient's history and counsel them appropriately. Dr. Danielson stated that when he has a patient who is willing, cooperative, and motivated, the whole process is made a lot easier. Dr. Danielson felt that in this situation, Claimant was angry with Employer and somewhat paranoid about their intentions, and this made it more difficult to direct Claimant. (EX-43, pp. 17-18).

Regarding Claimant's restrictions, Dr. Danielson stated that Claimant needs to avoid rapid head/neck movements, working overhead, prolonged extension of the head and neck, ladder climbing, repetitive bending, stooping, squatting, and crawling. Dr. Danielson opined that Claimant has a maximum weight lifting limit of 20 to 25 pounds and will need to change positions from sitting to standing to ambulating as his tolerance demands. Due to the two operative procedures on on the left ulnar nerve, Claimant should

avoid repetitive movements with the left upper extremity. Dr. Danielson stated that Claimant should not work on ships under construction unless he was working in a supervisory capacity and should avoid prolonged extension of his head and neck. Dr. Danielson stated that Claimant cannot work in or with insulation due to an allergic reaction. Dr. Danielson felt that Claimant could not work as a tape roller because of the strain to his neck and arms. Dr. Danielson opined that it was not in Claimant's best interests to remain at the shipyard. Dr. Danielson noted that Claimant would be most at risk in situations where he would have to turn or twist rapidly. (EX-43, pp. 18-20). Dr. Danielson repeatedly emphasized that Claimant should avoid repetitive motion overhead. Such repetitive motions would be involved in any overhead work and ladder climbing. (EX-43, pp. 40-52). Dr. Danielson stated that as long as Claimant's work fits within his limitations, whether it be in a supervisory capacity or not, he would release him to do that work. Dr. Danielson also stated that he would encourage Claimant to return to gainful employment. (EX-43, p. 45).

Dr. Danielson stated that he was aware of the prior surgery by Dr. Bazzone and that Claimant had been released as having reached maximum medical improvement in 1990. In light of this, Dr. Danielson opined that his previous injury combined with and contributed to the effects of his injury of May 8, 1992 to make Claimant materially and substantially more disabled than he would have been from the May 8, 1992 injury alone. Dr. Danielson also felt that the increase in Claimant's physical limitations, after his date of maximum medical improvement in 1990, was due to the second injury of May 8, 1992. Dr. Danielson felt that no further surgery was anticipated. (EX-43, pp. 47-48).

Claimant was first seen by Dr. Harry A. Danielson on June 9, 1992. In taking a history from Claimant, Dr. Danielson noted that Claimant has neck pain, shoulder pain, back pain between the shoulders, pain in his arms, numbness in his hands, aching in his toes and legs, and pain in the thoracic area. Dr. Danielson noted that Claimant's pain is brought on or made worse by turning his head to either side, bending his neck down, and bending his neck backward. Dr. Danielson noted that Claimant last worked on May 11, 1992. Dr. Danielson's impression was that Claimant was in need of a cervical and thoracic MRI scans with a special emphasis on T6-7. (EX43, Dep. Ex-8).

On July 9, 1992, Dr. Danielson stated that the cervical and thoracic MRI scans taken on 6/27/92 indicated "something strange" in the bone on the back side in the body of C6 on the T1 weighted image. There appeared to be defects at T3-4 and T6-7 with the situation appearing worse on the left side. Dr. Danielson felt that Claimant needed to have a cervical and thoracic myelogram. The results of the myelogram indicated a post operative interbody fusion at C4-5 and 6. Otherwise, the myelogram was normal. Dr. Danielson noted that the myelogram looked good, although there was a lot of movement on the cervical CT scan. Dr. Danielson noted small spurring at T5-6, and the CT scan showed Claimant to have central disc herniations at L5-S1 and L4-5 although it was not indicated on the myelogram. Claimant reported to Dr. Danielson that he was having a lot of pain in his legs and that sitting up straight caused him pain. (EX-43, Dep. Ex-8).

Dr. Danielson again saw Claimant on September 3, 1992. Claimant reported increased pain between his shoulder blades. Dr. Danielson opined that Claimant had three areas of trouble: the spur at T5-6 and the central disc bulges

at L5-S1 and L4-5, yet none of these were severe enough at that time to warrant operative intervention. (EX-43, Dep. Ex-8).

In a letter to Ms. Pam Clark of F.A. Richard & Associates, Dr. Danielson stated that it was his medical opinion that Claimant's neck pain was an aggravation of a pre-existing problem and that his back pain was causally related to his on-the-job injury of May 8, 1992. In a letter to Richard Hastings of F.A. Richard & Associates, Dr. Danielson stated that, based upon Claimant's history and the absence of other trauma, it was his opinion that with probable medical certainty that the continuing cervical problems and the recent anterior cervical discectomy at C6-7 are related to his on-the-job accident of May 8, 1992. (EX-43, Dep. Ex-8).

Claimant was seen by Dr. Danielson on February 7, 1995, at which time he reported that he was having such neck pain that he could not extend his head to shave. Claimant reported that his neck pain was on the left side. Dr. Danielson stated that he wished Claimant to undergo another cervical and thoracic MRI scan. According to Dr. Danielson, these MRI scans, which were taken on 2/13/95, showed a small central disc herniation at T3/4 and a disc herniation at C6/7. Dr. Danielson ordered another myelogram. On March 23, 1995, Dr. Danielson stated that after viewing the results of the myelogram, Claimant was shown to have a central disc herniation at L5-S1 and a large disc herniation at C6/7 which was pressing upon the spinal cord. Dr. Danielson found a possible minimal herniation of T3/4 to the left of the midline. Dr. Danielson recommended that Claimant get the disc at C6n cleaned out, as he was at risk for spinal cord injury. This procedure was completed on

May 21, 1995. (EX-43, Dep. Ex-8).

Dr. Danielson saw Claimant on August 17, 1995, at which time Claimant reported that when he tries to write, his fingers "get stuck." Dr. Danielson noted that the plug at C6/7 looked good. On December 14, 1995, Dr. Danielson stated that the most current myelograms and CT scans did not indicate that operative intervention was required. Dr. Danielson stated that it was in the best interests of Claimant to get into a different career and do something light. Dr. Danielson stated that Claimant had reached maximum medical improvement. On December 28, 1995, Dr. Danielson reiterated that Claimant had reached MMI as of December 14, 1995. Dr. Danielson also set forth Claimant's restrictions as needing to avoid rapid head-neck movement, working overhead, prolonged extension of his head and neck, ladder climbing. Dr. Danielson also stated that Claimant should not do repetitive bending, stooping, squatting, or crawling. Claimant was to have a maximum weight lifting limit of 20 to 25 pounds occasionally while using proper body mechanics. Dr. Danielson also stated that Claimant will need to change positions from sitting to standing to ambulating as his tolerance demands. (EX-43, Dep. Ex-8).

On May 6, 1997, Dr. Danielson stated that there was nothing further to offer Claimant from a neurosurgical standpoint. Dr. Danielson assigned Claimant a 12% anatomical impairment rating for the person as a whole as a result of his trauma and subsequent herniated disc, the operative procedure at C6/7, and his herniated disc at L5/S1. Dr. Danielson stated that Claimant is unable to work on ships under construction and is unable to work overhead. Dr. Danielson stated that Claimant cannot work with insulation due to his allergies to it. Dr. Danielson opined that it was in

Claimant's best interest that he no longer work at the shipyard. (EX-43, Dep. Ex-6).

Claimant was referred by Dr. Danielson to Dr. Christopher Y. Lew. Dr. Lew first saw Claimant on August 29, 1996. Dr. Lew reported that Claimant had suffered his initial injury in June of 1987, after which he underwent two ulnar nerve transpositions as well as a two level anterior cervical fusion at C4-5 and C5-6. Dr. Lew stated that Claimant began complaining again in 1992 of persistent pain. In May of 1995, Claimant underwent a second anterior cervical fusion, this time at the C6-7 level. Dr. Lew stated that Claimant returned to work on a light duty basis, but after approximately six months of work, he found that the physical demands of the job were still to strenuous and were making the pain much worse. Dr. Lew noted that Claimant's pain was constant and was aggravated by the movements of the head and neck, as well as by various sleeping positions and activities involving the upper extremities. Dr. Lew stated that Claimant had some radiation of pain into both upper extremities although the left side tended to by worse. Claimant was found to have degenerative changes on imaging studies affecting the lumbosacral, lumbar, and cervical spine. For an assessment, Dr. Lew found post cervical fusion pain syndrome with recurrent disc disease, persistent myofascial pain arising from underlying spine dysfunction. Dr. Lew also found a lumbosacral strain with lumbar degenerative disc disease. Dr. Lew recommended work restrictions, myoneural injections on a weekly basis to facilitate physical therapy, and continued physical therapy and medications. (EX-43, Dep. Ex-2)[1].

[1] "EX-43, Dep. Ex- " stands for "Employer's Exhibits 43, Deposition Exhibits number_." These deposition exhibits follow the deposition of Dr. Danielson.

Dr. Lew again saw Claimant on 2/18/97. At that time, Dr. Lew reported that Claimant's symptoms were stable. Dr. Lew noted that Claimant should be limited in his work activities to light duty. Dr. Lew stated that Claimant should be considered at maximum medical improvement ("MMI") at this time with the provision of ongoing an as needed basis for flare-ups of pain. (EX43, Dep. Ex-3). Claimant saw Dr. Lew on 3/19/97. Ãt this time, Dr. Lew stated that Claimant was stable and at MMI. Dr. Lew stated that in order to preserve his current physical level, it was very important that activity restrictions be adhered to. Dr. Lew felt that Claimant must not do work that will put any strain or pressure on his neck. (EX-43, Dep. Ex-4).

Mr. Joseph R. Walker, vocational rehabilitation counselor, performed rehabilitation consulting services in relation to this matter. On September 30, 1997, Mr. Walker sent a report to Ms. Pam Hale. Mr. Walker found that, in all probability, Claimant could return to modified work activity in the Insulation Department with Employer. Mr. Walker noted that Claimant would not be able to perform the full range of work activity as a joiner/insulation worker. However, Mr. Walker believed that there would be modified task activity in the Insulation Department that would be compatible with Claimant's restrictions. Mr. Walker stated that Claimant could perform the following work activities:

1) Handling boxes or pieces of insulation for storage or movement from the storage area on rubber tired carts;

2) Taking insulation supplies, packages of tape, broken packages of pins or caps to the ship for use and distribution to other insulation workers;

3) Cutting insulation panels to prescribed specifications, lengths, and measurements as called out by another co-worker;

4) Cut insulation panels in a preparatory manner in the Insulation storage area or in the passageways, compartments, or storage areas of the ship;

5) Insulation application consisting of applying insulation to the bulkheads from shoulder level down. This would include performing the work activity from the bottom two or three steps of a stepladder and work shoulder level down, applying the insulation panels to pins that are on the bulkhead wall;

6) Seaming the insulation panels with the adhesive tape;

7) Prep work, consisting of doing layout in the earlier phases of construction, marking the bulkhead wall, using a six by twelve rectangular blade with a handle such as a masonry or dry wall trowel to mark and utilize measurements to identify locations on the bulkheads where insulation pins would be applied;

8) Tape rolling;

9) Taping over the D.C. Boards (information brackets) installed in the compartments and passageways which are taped and the tape trimmed with the backing applied. At a subsequent time, the information holders would be installed at approximately shoulder or chest level in various compartments in passageways on the ships.

(EX-49, pp. 1-13).

Mr. Tommy Sanders also performed vocational rehabilitation services in connection with this case. W. Sanders issued a report dated October 13, 1997 after interviewing Claimant, reviewing his medical records and working history, and completing a labor market survey in the area in proximity to Claimant's home. Mr. Sanders stated that, in consideration of Claimant's age, education, hobbies, work history, and physical restrictions, he believed that Claimant could presently work at a range of unskilled, sedentary to light jobs in his surrounding labor market. Mr. Sanders identified several job openings that he believed were within the capabilities of Claimant. These were:

1) Gulf Coast Security Services: Opening for Security Guard at a pay rate of $5.15 per hour at 40 hours per week. Involved sitting at a guard shack, checking vehicles and people in and out, occasionally walking rounds;

2) Day Security Services: Opening for Security Guard at a pay rate of $5.15 to $5.50 per hour for up to 40 hours per week. Activities involved guarding an assigned commercial customer's property, observing for trespassers and fire hazards, and walking rounds;

3) Dixie Gas: Opening for a cashier at $5.15 per hour for up to 40 hours per week. Duties are cashiering with some light stocking and cleaning on an occasional basis;

4) Days Inn: Opening for a Front Desk Clerk at a wage of $5.50 per hour for 36 hours per week. The opening is for the 11 pm to 7 am shift. Duties involve checking guests in and out of the motel and handling payments from guests.

(EX-53, pp. 1-6).

On November 14, 1997, Mr. Sanders sent two additional jobs to Claimant. These jobs were:

1) Munro Petroleum, Inc.: Opening for Cashier with a pay rate of $5.50 per hour for 39 or more hours per week. A stool is provided for sitting;

2) Coastal Energy, Inc.,: Opening for Fuel Booth Cashier with a pay rate of $5.15 per hour. Weekly hours between 35 and 40. A stool is provided.

(EX-53, p. 12).

## DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, to weigh the evidence, and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiners. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962): Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 661 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g. It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); I.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that

the proponent of a rule or position has the burden of proof. Director OWCP v. Geenwich Collieries 5 12 U. S.267, 114 S. Ct. 2251 (1994), affig 990 F.2d 730 (3rd Cir.. 1993).

**Consolidation**

Employer in this case has opposed the consolidation of the two claims. I see no reason why the two claims should not be consolidated. Consolidation would avoid needless delay in resolving the issues presented. Further, the one issue remaining from the original claim, a determination of Claimant's post-injury wage earning capacity, is a relatively minor issue. Separate proceedings for the determination of this issue are unnecessary.

**Remand Issue: Claimant's Post-Injury Wage Earning Capacity**

The first issue for discussion is the determination of whether Claimant's post injury wages fairly and reasonably represented his wage earning capacity following his return to work with Employer after his 1987 accident. This issue is before me per the remand order of the Fifth Circuit dated November 13, 1996. Specifically,, the Fifth Circuit stated that the Administrative Law Judge (ALJ) in the initial Decision and Order made no finding that Claimant's post injury earnings were representative of his wage-earning capacity under Section 908(h) of the Act. To determine post-injury wage earning capacity, Section 8(h) of the Act provides:

> (h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this

> section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, that if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earnings capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. Section 908(h).

It is widely accepted that where a claimant seeks benefits for total disability and the employer establishes suitable alternate employment, the earnings established for the alternate employment show the claimant's wage-earning capacity. See Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231, 233 (1984). In the original claim, Claimant sought benefits for total disability and Employer established suitable alternate employment by offering suitable light duty employment in its facility. There was no indication that the employment offered was sheltered employment. Thus, the earrings established for the light duty employment, which were also Claimant's actual wages at that time, were representative of Claimant's wage earning capacity. Under the Act, the party that contends that Claimant's actual wages were not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. See Grage v. J.M. Martinac Shipbuilding, v. Director, OWCP 900 F.2d

180,23 BRBS 127 (CRT) (9th Cir. 1990); Misho v. Dillingham Marine & Mfg., 17 BRBS 188, 190 (1985); Spencer v. Baker Agric. Co., 16 BRBS 205, 208 (1984); Burch v. Superior Oil Co., 15 BRBS 423, 427 (1983). Here there is no indication that Claimant attempted to establish an alternative reasonable wage-earning capacity other than to assert that Claimant was totally disabled and had no wage earning capacity. As such, Claimant's wage earning capacity was represented by his post-injury wages. This is the result that should have been presumed by the Fifth Circuit. However, it was not and since an actual determination of the post injury wage earning capacity was ordered, I will comply.

Wage earning capacity refers to "an injured employee's ability to command regular income as the result of his personal labor." Seidel v. General Dynamics Corp., 22 BRBS 403, 405 (1989)(citing 2 A. Larson, The Law of Workmen's Compensation Section 57.51 at 10- 164.64 (1987). Section 8(c)(21) provides that an award for unscheduled permanent partial disability is based on the difference between the claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. If Claimant has a physical impairment but it can be found that Claimant has suffered no loss in his wage-earning capacity, he has suffered no financial loss and therefore is not disabled. 33 U.S.C. Section 908(h); Del Vacchio v. Sun Shipbuilding & Dry Dock Co., 16 BRBS 190, 194 (1984).

Section 8(h) mandates a two-part analysis in order to determine the claimant's post-injury wage-earning capacity. Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649, 660 (1979). The first inquiry requires the judge to determine& whether the claimant's actual post injury wages

reasonably and fairly represent his wage-earning capacity. Randall v. Comfort Control, Inc., 725 F.2d 791,796,16BRBS 56, 64 (CRT) (D.C. Cir 1984). If the actual wages are unrepresentative of the claimant's wage earning capacity, the second inquiry requires that the judge arrive at a dollar amount which fairly and reasonably represents the claimant's wage-earning capacity. Id. at 796-97, 16 BRBS at 64. If the claimant's actual wages are representative of his wage-earning capacity, the second inquiry need not be made. Devillier 10 BRBS at 660.

For both parts of the wage-earning capacity analysis, the judge must take a number of factors into consideration. The judge must consider the claimant's physical condition, age, education, industrial history, availability of employment, claimants earning power on the open market, continuity and stability of claimant's post-injury work, and whether medical and other circumstances indicate a probable future wage loss due to the work-related injury. Devillier 10 BRBS at 651, Warren v. National Steel & Shipbuilding Co., 21 BRBS 149,153 (1988).

Accordingly, I must first determine whether claimant's actual post injury wages reasonably and fairly represent his wage-earning capacity. Claimant returned to work with Employer in a modified joiner position on October 29, 1990. At that time, Claimant was still of young age and his education was adequate for employment as a joiner. At the original hearing of October 2, 1991, Claimant stated that he was currently working the same number of hours as he had before he was injured. Claimant also stated that he was earning more money ($12.28 per hour) than he had been before his injury ($10.28 per hour). Claimant also acknowledged that he had good attendance and had not received any disci-

plinary notices for poor work since returning to work on October 29, 1990. (EX-27, p. 11). As such, Claimant's work was stable and there was no indication, at that time, that Claimant would have a future wage loss due to his original work related injury. Further, Dr. Danielson testified at his original deposition that the fact that Claimant had performed his fight duty work for almost a year and continuing was a good indication of his ability to be able to perform that work into the future. Accordingly, Claimant's actual post injury wages both reasonably and fairly represented his wage-earning capacity.

**Causation**

We now turn to the second claim filed in this case. This claim has arisen due to an accident occurring on May 8, 1992. Initially, the claimant has the burden of establishing a prima facie case of compensability, namely to demonstrate a physical and/or mental harm was sustained and prove that working conditions existed or an accident occurred which could have caused the harm. Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336, 338 (1981); U.S. Industries/Federal Sheet Metal Inc. v. Director, OWCP, United States Department of Labor, 455 U.S.608, 616, 102 S.Ct. 1312, 1318 (1982). Once Claimant establishes these two elements of a prima facie case, Section 20(a) of the Act favors Claimant with a presumption that links the harm suffered with Claimant's employment. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Hampton v. Bethlehem Steel Corp. 24 BRBS 141, 143 (1990); Noble Drilling Co. v. Drake, 795 F.2d 478, 481 (5th Cir. 1986). Moreover, Section 20(d) of the Act favors Claimant with a presumption that the injury suffered was not occasioned by the willful intention of the injured employee to injure or kill

himself or another. Green v. Atlantic & Gulf Stevedores-Incorporated, 18 BRBS 116 (1986).

The mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. U.S. Indus./Fed. Sheet Metal v. Director OWCP, 455 U.S. 608 (1982), rev'g Riley v. U.S. Indus./Fed. Sheet Metal 627 F.2d 455 (D.C. Cir. 1980). The claimant's theory as to how the injury occurred must go beyond "mere fancy." Champion v. S&M Traylor Bros., 690 F.2d 285, 295 (D:C. Cir. 1982).

A claimant's uncontradicted, credible testimony alone may constitute sufficient proof of physical injury and form the basis of an award of compensation. Golden v. Eller & Co. 8 BRBS 846, 849 (1978), aff'd 620 F.2d 71, 74 (5th Cir. 1980); Avondale Shipyards. Inc. v. Kennell, 914 F.2d 88, 91 (5th Cir. 1990).

After the presumption has been established, the employer must introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. Sections 902(2), 903. Only after the employer offers substantial evidence does the presumption fall "out of the case." Del Vecchio v. Bowers, 296 U.S. 280, 186, 56 S.Ct. 190, 193 (1935). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Sprague v. Director OWCP, United States Department of Labor, 688 F.2d 862, 865 (1st Cir. 1982). Such evidence must be specific and comprehensive enough to sever the potential question between the liability and the work environment. Parsons Corp. v. Director, OWCP United States Department of Labor, 619 F.2d 3 8, 41 (9th Cir. 1980).

If the Employer succeeds in its burden, the issue of causation must be resolved based upon the evidence as a whole. Kier v. Bethlehem Steel Corp., 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., et al, 25 BRBS 15, 21 (1991). When the evidence as a whole is considered, it is the proponent (Claimant) who has the burden of proof See Greenwhich Collieries, 512 U.S. 267.

Here, there is no question of a work related accident and injury which occurred on May 8, 1992. While it is clear that Claimant had an underlying condition in his neck and elbow, under the Act, a work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. Preziosi v. Controlled Indus., 22 BRBS 468 (1989); Januszewicz v. Sun Shipbuilding & Dry Dock Co., 22 BRBS 376 (1989) (Decision and Order on Remand). Clearly, Claimant aggravated his neck condition on May 8, 1992.

Accordingly, Claimant has proved his prima facie case. Employer has not attempted to introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out of or in the course of employment." Accordingly, causation has been proved by Claimant

**Nature and Extent of Disability**

"Disability" under the LHWCA means incapacity as a result of the injury in question to earn wages which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C.§902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psycho-

logical impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991).

Regarding the nature and extent of disability, in the initial stage, the claimant need not establish that he could not return to any employment, only that he could not return to his former and "usual" employment. Elliot v. C&P Tel. Co., 16 BRBS 89 (1984). The same standard applies regardless of whether the claim is for temporary total or permanent total disability. If the claimant meets this burden, he is presumed to be totally disabled. Walker v. Sun Shipbuilding & Dry Dock Co. (Walker II) 19 BRBS 171 (1986). Here, Claimant must establish that he could not return to his usual employment and that his inability to return to his employment is at least partially connected to his injuries sustained on August 2, 1996.

I find that Claimant has established his prima facie case of total disability. No doctor in this case has suggested that Claimant was able to resume his "usual"' unmodified employment after August 2, 1996, nor has Employer argued that he could. The evidence shows that Claimant's previous neck condition was aggravated by his injury on May 8, 1992, and as such, the injury was a contributing factor in Claimant's inability to return to his employment. Accordingly, Claimant has established his prima facie case of total disability.

Once a claimant establishes a prima facie case of total disability, the burden shifts to the employer to establish suitable alternate employment. An employer must show the existence of realistically available job opportunities within the geographic area where the employee resides which he is capable of performing, considering his age, education, work

experience and physical restrictions, and which he could secure if he diligently tries. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), rev'g 5 BRBS 418 (1977); Diamond M Drilling Co. v. Marshall, 577 F.2d 1003, 8 BRBS 658 (5th Cir. 1978) aff'g Kilsby v. Diamond M Drilling Co., 6 BRBS 114 (1977).

An employer can meet its burden of showing suitable alternate employment by offering the claimant a job in its facility, Spencer v. Baker Agricultural Co., 16 BRBS 205 (1984), including a light duty job, so long as it does not constitute sheltered employment. Darden v. Newport News Shipbuilding & Dry Dock Co. 18 BRBS 224 (1986); Harrod v. Newport News Shipbuilding & Dry Dock Co., 12 BRBS 10, 12-13 (1980). Here, Employer returned Claimant to work following his May 8, 1992 injury. Claimant returned to work in October of 1992 and was employed installing bunks on a ship. (Tr. p. 70). Claimant stated that the work of installing bunks included the drilling the pop rivets, which aggravated his arm. Claimant stated that even though this aggravated his previous injury, he stayed with it and as a result, never had a problem with supervisors or never got in trouble for missing work. Claimant was under the impression that he would have pain for the rest of his life and needed to find ways to cope with it. (Tr. p. 70). Claimant had surgery on his neck early in 1995 due to extreme pain and stiffness. Claimant then returned to work as in a modified joiner position in January of 1996. In Claimant's return, he first was employed doing layout work, then as a tape roller. Claimant worked as a tape roller for approximately seven months when he was forced to quit due to increased pain from the repetitious nature of the task.

Normally, under the Act, suitable alternate employment would be established where a claimant returned to work in the employer's facility. However, in this case, we have a situation where it is not clear that the work offered was "suitable" as Claimant alleges it caused him aggravation of his injuries. Thus, our question now is whether the light duty employment offered to Claimant was too physically demanding for Claimant to perform.

Under the Act, an employer's job offer which is too physically demanding for a claimant to perform is not suitable alternate employment. Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980); Perini Corp. v. Heyde, 306 F. Supp. 1321, 1328 (D.R.I. 1969); Mason v. Bender Welding & Mach Co.," 16 BRBS 307, 309 (1984). Here, Claimant was able to work for a period of time in a modified joiner capacity but eventually was forced to leave work and undergo additional surgical procedures on his neck. Later, in 1996, Claimant was able to perform the tape rolling job for approximately seven months. After seven months, Claimant complained of increasing pain due to the repetitious nature of the task. Claimant was sent to Employer's infirmary and from there was sent to Dr. Danielson who again pulled Claimant from work. (Tr. p. 76). Dr. Danielson later opined that Claimant could not work as a tape roller because of the strain to his neck and arms. (EX-43, p. 45).

It is clear that Claimant had substantial difficulty in performing the duties of the modified joiner position. His job activities aggravated his condition to such an extent that further surgery was required on his neck. This being so, it is apparent that the modified employment undertaken by Claimant after 1992 was too physically demanding for

Claimant to handle. The same may be said for the tape rolling job which ultimately aggravated Claimant's condition. As such, I think that there is no question that the tape rolling job was not suitable for Claimant either. Accordingly, Employer's proffering of the modified joiner position and the tape roller position do not constitute suitable alternate employment. I note that there are no medical opinions submitted that state a contrary finding.

Employer asserts that their further offering of a modified joiner position on August 5, 1997, which paid the regular wage of a first class joiner constituted suitable alternate employment. Again, the following job activities were submitted by Employer as a modified joiner position which would constitute suitable alternate employment:

1) Handling boxes or pieces of insulation for storage or movement from the storage area on rubber tired carts;

2) Taking insulation supplies, packages of tape, broken packages of pins or caps to the ship for use and distribution to other insulation workers;

3) Cutting insulation panels to prescribed specifications, lengths, and measurements as called out by another coworker;

4) Cutting insulation panels in a preparatory manner in the insulation storage area or in the passageways, compartments, or storage areas of the ship;

5) Insulation application consisting of applying insulation to the bulkheads from shoulder level down. This would include performing the work activity from the bottom two or

three steps of a stepladder and work shoulder level down, applying the insulation panels to pins that are on the bulkhead wall;

6) Seaming the insulation panels with the adhesive tape;

7) Prep work, consisting of doing layout in the earlier phases of construction, marking the bulkhead wall, using a six by twelve rectangular blade with a handle such as a masonry or dry wall trowel to mark and utilize measurements to identify locations on the bulkheads where insulation pins would be applied;

8) Tape rolling;

9) Taping over the D.C. Boards (information brackets) installed in the compartments and passageways which are taped and the tape trimmed with the backing applied. At a subsequent time, the information holders would be installed at approximately shoulder or chest level in various compartments in passageways on the ships.
(EX49, pp. 1-13).

The job offered was full time and within Claimant's same department. The job was suitable according to Mr. Joe Walker, who is an independent certified rehabilitation counselor. According to Employer, Claimant would have been allowed a wide latitude to refuse work that was outside of his limitations. Claimant was invited to an interview in which the specific requirements of the job(s) would have been discussed. However, Claimant refused to come to the interview. Claimant later stated that he refused to do further work for Employer under any circumstances.

I find that the modified joiner position offered by Employer is not acceptable as suitable alternative employment. Regarding the medical opinions in the record, there is only one opinion that is of note, that being the opinion of Dr. Danielson. No other medical opinions on the subject of whether or not Claimant could work in the shipyard have been offered. Dr. Lew, while not addressing this issue, did state that Claimant must not do work that will put any strain or pressure on his neck. (EX-43, Dep. Ex-4).

In regard to the tape roller position, which was one of the activities slated for Claimant's modified joiner position, Dr. Danielson felt that Claimant could not work as a tape roller because of the strain to his neck and arms. Dr. Danielson did state that as long as Claimant's work fits within his limitations, whether it be in a supervisory capacity or not, he would release him to do that work. (EX-43, p. 45). However, in general, Dr. Danielson opined that it was not in Claimant's best interests to remain at the shipyard. Dr. Danielson noted that Claimant would be most at risk in situations where he would have to turn or twist rapidly. (EX-43, pp. 18-20). Dr. Danielson also repeatedly emphasized that Claimant should avoid repetitive motion overhead and that such repetitive motions would be involved in any overhead work and ladder climbing. (EX-43, pp. 40-52).

Dr. Danielson, in his deposition, again stated that it was in the best interests of Claimant to get into a different career and do something light. (EX-43, Dep. Ex-8). At that time, Dr. Danielson opined that Claimant was vulnerable to repeat injury and should be employed in a light-duty supervisory capacity. Dr. Danielson opined that shipwork was not suitable for Claimant because the working conditions were such that a person was always subject to bumping his head and

overhead working was not in Claimant's best interests. (EX-43, p. 9).

Accordingly, it is overwhelmingly clear that Dr. Danielson is not in favor of Claimant returning to work in the shipyard in any capacity, with the possible exception of a supervisor position. No other medical opinion on this issue is in evidence, thus, the weight of medical evidence in this case does not support a finding of suitable alternate employment based on the offering of a modified joiner position.

Further, Claimant has testified that overall, there is no job in the shipyard that he can do on a eight-hour a day, 40 hour per week basis, because there are days when he cannot work as his hands are in significant pain and his neck is restrictively stiff. (Tr. p. 123). 1 have found no reason to question the credibility of Claimant's testimony, thus I will credit it in full and afford it substantial weight.

In reviewing the task descriptions submitted by Employer, it is also fairly reasonable to conclude that the tape rolling task was one of, if not the least strenuous of all of the tasks listed. It would seem that if the tape rolling task exceeded his restrictions and aggravated Claimant's condition, the more strenuous tasks that were listed would do the same or worse. Also, Claimant, should he work in the modified joiner position, would be put back to work in the shipyard and would, in many instances, be working with a regular crew. In such a situation, the chances of Claimant exceeding his restrictions on occasion would be great. Such was the case when Claimant previously worked for Employer and I see no reason why such instances would not occur again. These instances would put Claimant at an increased peril for re-injury or aggravation.

Accordingly, based on the medical opinion in this case, the testimony of Claimant, and my own observations, I find that the offering of a modified joiner position does not constitute suitable alternate employment.

Employer next argues that Claimant has suffered no loss of wage earning capacity as he has worked on a job constructing a tower and earned an average of approximately $2,000.00 per week, which would far exceed the average weekly wage earned with Employer. As stated previously, if Claimant has a physical impairment but it can be found that Claimant has suffered no loss in his wage-earnings capacity, he has suffered no financial loss and therefore is not disabled. 33 U.S.C. Section 908(h). Here however, it is clear that the temporary job Claimant undertook was a one time job on a limited basis (eight days). Thus, I find that Claimant's work on the tower construction and his pay earned from his labor was in no way representative of his wage earning capacity on the open market.

Next Employer asserts that Claimant has suffered no loss of wage earning capacity as he is presently making more now running his own business than he did when he was working for Employer. While Claimant presently pays himself approximately $250.00 per week, Employer argues that this figure should be much higher as it does not incorporate the amounts voluntarily reinvested back into the company. Employer states that Claimant's company has profited over $3,395.25 in the 13 weeks it has been running. Employer asserts that had Claimant pocketed all of the profits instead of reinvesting a substantial portion of them, his average weekly wage would be approximately $511.17, which would be higher than the stipulated weekly wage of $412.51.

First, Claimant has not been pocketing all of his profits, but instead has only been taking approximately $250.00 per week. Thus, regardless of what Claimant could do with the profits, he is still only pocketing $250.00 per week. Also, with the failure rate of first-time small business, it is quite likely that Claimant's business will require re-investment in order to stay financially secure. Thus, Claimant will likely be re-investing additional funds in the future. Secondly, even if Claimant did not re-invest all of the profits, the profit money will likely be diverted elsewhere. Claimant will soon have additional expenditures in the form of liability insurance, medical coverage, additional taxes, and the hiring of an accountant. (Tr. pp. 110-111). Third, Claimant also makes his money dependent on how many jobs are available to him. Thus, Claimant is dependent on the market for mobile homes and the number of houses sold by Grand Housing. Should that market stall, Claimant would not make any money. Accordingly, I find that the profits made by Claimant's fledgling company are not indicative of Claimant's wage earning capacity. Instead, I find that the his actual average earnings of $250.00 per week are much more reasonable. Thus, I find that Claimant's present wages of $250.00 fairly and reasonably represent his wage earning capacity.

Employer has also submitted evidence of other suitable alternate employment. Clearly, the positions of cashier at Dixie Gas, Munro Petroleum, Inc., and Coastal Energy, Inc., fall within the restrictions of Claimant. Again, the restrictions set out by Dr. Danielson were as follows: no rapid head-neck movement, working overhead, prolonged extension of his head and neck, ladder climbing, repetitive bending, stooping, squatting, or crawling. Claimant was to have a maximum weight lifting limit of 20 to 25 pounds occa-

sionally while using proper body mechanics. Dr. Danielson also stated that Claimant will need to change positions from sitting to standing to ambulating as his tolerance demands. (EX-43, Dep. Ex-8). At the cashier position, Claimant will have a stool and will be able to change positions from sitting to standing. Claimant will not be in a situation where he win have to repetitively bend, stoop, squat, or crawl. Accordingly, I find that the cashier positions identified by Employer would constitute suitable alternate employment. However, as none of the positions pay more than $5.50 per hour, Claimant's present job, which pays him $250.00 per week, shall be used in determining his loss of wage earning capacity.

The evidence indicates that Claimant began his self-employment on August 31, 1997. Accordingly, as of August 31, 1997, Claimant's disability becomes partial in nature. Employer will not be liable for compensation benefits for the eight days Claimant spent working on the tower construction. As the parties have stipulated that Claimant has reached maximum medical improvement on December 14, 1995, Claimant's disability is also permanent. Previous to the date of August 31, 1997, Claimant is entitled to total disability for the dates on which he was not working due to his work related injuries. The parties have stipulated to an average weekly wage of $412.51. Past the date of August 31, 1997, Claimant is entitled to permanent partial benefits based upon a loss of wage earning capacity of $162.51 ($412.51 - $250.00 (Claimant's present wage earning capacity)).

**Section 8(f) Relief**

Employer has requested Section 8(f) relief. Section 8(f)

shifts part of the liability for permanent disability from the employer to the Special Fund established by Section 44, when the disability is not due solely to the injury which is the subject of the claim.

Section 8(f) relief is available if three requirements are met: (1) that the claimant had a pre-existing permanent disability, (2) that this partial disability was manifest to the employer-, and (3) that it rendered the second injury more serious than it otherwise would have been. Director, OWCP v. Berkstresser, 921 F.2d 306, 309, 24 BRBS 69 (CRT) (D.C. Cir. 1990), rev'g 16 BRBS 231 (1984), 22 BRBS 280 (1989). In cases of permanent total or permanent partial disability there are an additional three requirements: (1) a new injury; (2) the disability must not be due solely to the new injury; (3) the disability must be materially and substantially greater than that which would have resulted from the new injury alone. Jacksonville Shipyards v. Director, QWCP 851 F.2d 1314, 1316-17 (11th Cir. 1988), Director v. Newport News Shipbuilding & Dock Co., 8 F.3d 175 (4th Cir. 1993).

In assessing Employer's entitlement to Section 8(f) relief, it must first be established that Claimant had a pre-existing disability. Clearly, Claimant suffered an injury to his neck and elbow in 1987 while in the employ of Employer. Afterward the recovery process, Claimant was once again employed by Employer. Accordingly, Employer has shown that Claimant had a pre-existing disability to his neck and elbow.

The next question is whether this disability was manifest to Employer. Clearly, Employer was aware of Claimant's accident and resulting injury on September 24, 1987. Employer was also aware of the resulting disability and

work limitations based on that disability.

The next issue is whether the initial disability/injury rendered the second injury more serious than it otherwise would have been. Here, the initial injury to Claimant's neck undoubtedly made Claimant's second neck injury worse. Dr. Danielson stated that it was his medical opinion that Claimant's neck pain was an aggravation of a pre-existing problem. (EX-43, Dep. Ex-8). Dr. Danielson later specifically testified that Claimant's pre-existing 1987 injury combined with and contributed to the effects of the injury of May 8, 1992 to make the Claimant materially and substantially more disabled than he would have been as a result of the injury of May 8, 1992 alone. From my viewpoint, it is clear that Claimant's prior injury and operation on his neck made the second injury more severe, especially in light of the fact that Claimant's second injury was not traumatic and the injury was caused only by a quick twisting of the neck. Accordingly, I think there is no question that Claimant's pre-existing injury due to his accident in September of 1987, had combined with Claimant's second injury in 1992, to make Claimant's injury more serious than it otherwise would have been.

To restate, in cases of permanent total or permanent partial disability there are an additional three requirements: (1) a new injury; (2) the disability must not be due solely to the new injury; (3) the disability must be materially and substantially greater than that which would have resulted from the new injury alone.

Clearly, there was a new injury on May 8, 1992. It is also clear that the present disabilities are due to both the new injury and the past injuries. Finally, it is readily apparent that

Claimant's underlying neck condition made the resulting disability materially and substantially greater than that which would have resulted from the new injury alone. I base this on Dr. Danielson's opinion and the fact that Claimant's second injury was a simple twist that was not traumatic. Thus, it is clear that Claimant's underlying condition had to have combined with his injury to make his present disability significantly worse. Accordingly, Employer is entitled to Section 8(f) relief.

Under Section 8(f)(1), if the employment injury is a non-scheduled injury which results in permanent partial or permanent total disability, the employer's liability is limited to 104 weeks of compensation; thereafter, the Special Fund makes the compensation payments. Therefore, Employer's and Carrier's 104 weeks of liability begins when Claimant has permanency status regarding his disability. Disability, either partial or total, will be considered permanent -if, and when, the claimant's condition reaches the point of maximum medical improvement. James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989). Thus, Employer's liability for permanent partial disability payments will end 104 weeks past the date of maximum medical improvement. Thereafter, the Special Fund would assume the payment of benefits. Here, the date of maximum medical improvement is December 14, 1995, as assigned by Dr. Danielson and stipulated to by the parties.

**Sanctions**

Claimant has also requested sanctions for alleged discovery abuses committed by Employer. Specifically, Claimant suggests that Employer ignored discovery requests through evasive and incomplete answers and that Employer

failed to respond to the requests within ten days of the due date. Claimant submitted Interrogatories and Request for Production of Documents to Employer which were received on September 10, 1997. Employer submitted answers to the discovery requests on October 20, 1997. I find that the any delay in the submission of discovery responses was not prejudicial to Claimant. Claimant further alleges that the answers given by Employer in it responses to discovery requests were evasive. In reviewing Employer's responses, I did not find anything so unusual or egregious as to warrant sanctions.

**Interest and Attorneys Fees**

Claimant is entitled to interest on any accrued unpaid compensation benefits. Watkins v. Newport News Shipbuilding & Dry Dock Company 8 BRBS 556, 559 (1978), aff'd in part, rev'd in part sub nom., Newport News Shipbuilding & Dry Dock Company v. Director, OWCP, 594 F.2d 986 (4th Cor. 1979). Interest is mandatory and cannot be waived in contested cases. Byrum v. Newport News Shipbuilding and Dry Dock Co., 14 BRBS 833 (1982); Mac Donald Building & Dry Dock, Co., 10 BRBS 734 (1978).

Section 28 of the Act and implementing Code of Federal Regulations Section 702.132 provide for approval of attorney fees. Claimant's counsel, Blewett Thomas, is hereby directed to file attorney fee petitions within 30 days of receipt of this Decision and Order while at the time serving copies on Employer's counsel who shall then have 30 days from receipt in which to respond to the fee applications.

## ORDER

It is therefore ORDERED that:

(1) Employer shall pay Claimant compensation for temporary total disability from May 9, 1992 to December 14, 1995, the date of maximum medical improvement, but will exclude those days in which Claimant was working, based on an average weekly wage of $412.51, and in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. §908(b);

(2) Employer shall pay Claimant compensation for permanent total disability from December 14, 1995 to August 31,1997, the date suitable alternative employment was undertaken by Claimant, but will exclude those days in which Claimant was working, based on an average weekly wage o f $412.51, and in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. §908(a);

(3) Employer shall pay Claimant compensation for permanent partial disability from August 3 1, 1997, and continuing, based upon a loss in wage earning capacity of $162.51, and in accordance with Section 8(c) of the Act. 33 U.S.C. §908(c).

(4) Employer's request that they be afforded Section 8(f) relief commencing December 14, 1997 is hereby GRANTED. Section 8(f) relief is granted to Employer to relieve Employer of any liability for disability benefi's 104 weeks after the December 14, 1995 maximum medical improvement date;

(5) Employer is entitled to credits for any compensation

paid to Claimant for the above noted periods;

(6) Employer shall pay for or reimburse Claimant for all necessary and reasonable medical care and treatment related to his May 8, 1992 work-related injury and aggravations;

(7) Employer shall pay Claimant interest on any accrued unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the last auction of 52 week United States Treasury bills as of the date this Decision and Order is filed with the District Director;

(8) Claimant's counsel, Blewett Thomas, shall have 30 days from receipt of this Order in which to file an attorney fee petition and simultaneously serve a copy of the petition on opposing counsel. Thereafter, Respondents shall have 30 days from receipt of the fee petition in which to respond to the petition.

So ORDERED this the 15th of April, 1998 at Metairie, Louisiana.

/s/ Richard D. Mills

RICHARD D. MILLS
Administrative Law Judge

## APPENDIX G

**U.S. Department of Labor**
**Office of Administrative Law Judges**
**Heritage Plaza, Suite 530**
**111 Veterans Memorial Blvd.**
**Metairie, LA 70005**
**(504) 589-6201**

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| In the Matter of | ) | |
| | ) | |
| RENE DARBY, | ) | Case Nos. 91-LHC49 |
| Claimant | ) | 97-LHC-1556 |
| against | ) | |
| | ) | OWCP Nos. 06-110624 |
| INGALLS SHIPBUILDING, | ) | 06-145508 |
| INC., | ) | |
| Self-Insured Employer | ) | |

## ORDER DENYING CLAIMANT'S MOTION FOR RECONSIDERATION

Claimant on May 11, 1998, filed a Motion for Clarification of my April 15, 1998 Decision and Order Awarding Compensation Benefits, or alternatively, for Reconsideration of the claims made by Claimant.

Claimant first requests clarification of whether the two claims in this case were fully and formally consolidation. First, as stated on page 15 of the Decision and Order,

the two claims were consolidated for purposes of the hearing. Separate proceedings for the determination of the remand issue were found to be unwarranted. Thus, for purposes of the hearing, the claim were consolidated. Both claim numbers shall continue to be used. The two claims, however, will not be termed as a single cause of action. The two claim represented two separate and distinct injuries, although the second claim arose out of an aggravation of the original injury.

Second, the only issue on remand from the Board was that of whether Claimant's post injury wages fairly and reasonably represented his wage earning capacity following his return to work with Employer after his 1987 accident. The Decision and Order of April 15, 1998 effectively addressed this Remand issue. As such all issues arising out of the first claim have been properly adjudicated. If Claimant wishes to appeal, his appeal will be limited to that Remand issue only. Claimant has filed a Motion for Reconsideration, dependent on whether the two aforementioned claims were consolidated in a single cause of action. Since they are obviously not a single cause of action, I will now address Claimant Motion for Reconsideration.

Claimant first asserts that, regarding his 1987 injury, he is entitled to a *de minimus* award based on the Supreme Court's in Rambo II. I disagree. The decision in Rambo II solidified the Fifth Circuit's established position of allowing *de minimus* or nominal awards in certain situations where the claimant has a proven work-related medical disability which has not diminished his present wage earning capacity. *See generally*, Hole v. Miami Shipyards, Corp., 640 F.2d 769, 772, 13 BRBS 237 (5th Cir. 1981). The Court will allow these type of awards where there is "significant

potential that the injury will cause diminished capacity under future conditions." Rambo II, __U.S.__. 117 S.Ct. at 1963. This holds open the possibility for modification of an award under 33 U.S.C. § 922 if future events or circumstances change a potential disability into an actual one. Id.

While Claimant appears to fulfill the requirements necessary for a *de minimus* award, upon closer examination it is clear that the danger for which the de minimus award was designed to guard against are not present in this case. Claimant, in his second claim, sustained an aggravation to his original injury for which he was granted permanent partial benefits. While under the Act, this aggravation was a "new injury," it clearly arose out of the original 1987 injury. Thus, any present loss in wage earning capacity is a product of the combination of the 1987 injury and the 1992 aggravation. As such, the loss in wage earning capacity is duly represented by the award of permanent partial disability benefits which takes into consideration Claimant's physical capabilities as they existed at the time of the award. In other words, the original injuries suffered in 1987 are accounted for in the award of permanent partial disability benefits.

The intent behind Rambo-II is to ensure that Claimant's are not left without recourse when they have no present loss of wage earning Capacity but will likely have a future loss of wage earning capacity. Such claimants, since they have no present loss of wage earning capacity and no right to an award of disability, lose the right to a Section 22 modification after one year. The *de minimus* award however, allows the window of opportunity in which to file for a Section 22 modification to stay open indefinitely. Thus, in regards to whom the de minimus award is designed to pro-

tect, we see that the *de minimus* award is granted only to those claimant's who have no present loss of wage earning capacity. In this case, Claimant certainly has a present loss of wage earning capacity, due to both his 1987 injury and his 1992 aggravation. As such, he cannot be awarded a *de minimus* award. To note, Claimant's permanent partial disability benefits leave open the possibility of modification under Section 22 at a later date.

Claimant next asserts that a *de minimus* award is proper as the 1987 injury may have contributed to the onset of carpal tunnel syndrome in Claimant's hands. To clarify, the *de minimus* award is designed to protect a claimant's rights for a Section 22 modification for a probable future loss of wage earning capacity. However, the loss in wage earning capacity must relate back to the injury which was the source of the claim. Claimant' s claim of carpal tunnel syndrome has not been substantiated, evidenced, or adjudicated in the previous claims. As such a Section 22 modification could not even address it.

Claimant next asserts that he is entitled to a Section 22 modification. Apparently, Claimant requests a Section 22 Modification based on the assertion that he suffered a loss of wage-earning capacity while he was receiving temporary total disability in that he was only receiving 2/3rds of his average weekly wage as temporary total compensation. Hence, Claimant asserts that he has suffered a 1/3rd loss in his wage-earning capacity during the 1992 and 1995 temporary total disability periods.

From the outset, I note that there is absolutely no

basis, legal or otherwise, for Claimant's assertion. I would direct Claimant's attention to Section 8(b) of the Act which states:

> (b) Temporary total disability: In case of disability total in character but temporary in quality 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance there-of

33 U.S.C. §908(b).

Simply put, an injured worker who receives benefits under the Act for total disability receives 2/3rds of his wages during the period of total disability. There are no deviations from the statute and the judge has no discretion in this matter. A claimant has no right to recover the remaining one third.

Upon consideration of Claimant's Motion for Reconsideration, any opposition thereto, and the record herein, Claimant's Motion for Reconsideration is hereby DENIED.

So ORDERED this the 25th day of JUNE, 1998 at Metairie, Louisiana.

/S/ Richard Mills

RICHARD D. MILLS
Administrative Law Judge

**APPENDIX H**

U.S. Department of Labor Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 92-1547

RENE M. DARBY

Claimant-Petitioner

V.

INGALLS SHIPBUILDING, INCORPORATED DATE ISSUED: Aug 20 99

Self-Insured
Employer-Respondent

**ORDER**

Claimant has filed a timely motion for reconsideration of the Board's May 24, 1999 Order denying an attorney's fee to claimant's counsel for work performed before the Board. 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407(a). Employer responds, urging denial of claimant's motion. We deny the motion for reconsideration for the reasons that follow, and we therefore affirm the denial of an attorney's fee.

Claimant sustained left elbow and cervical spine injuries in September 1987 for which employer paid temporary total disability benefits. In his initial decision, the administrative law judge found claimant's thoracic spinal condition unrelated to the work injury, that employer provided suitable alternate employment in its facility, that

claimant has no loss in wage-earning capacity, that claimant is entitled to an award under the schedule for a 15 percent impairment to his left arm, that claimant's average weekly wage is higher than that paid by employer, and that employer is not liable for the treatment provided by Dr. Danielson. Claimant appealed this decision to the Board, raising issues relating to suitable alternate employment and wage-earning capacity. The Board affirmed the admini strative law judge's decision in all respects. *Darby v. Ingalls Shipbuilding, Inc.*, BRB No. 92-1547 (Feb. 24, 1995).

Claimant appealed the Board's decision to the United States Court of Appeals for the Fifth Circuit. The court affirmed the finding that employer established suitable alternate employment by virtue of a light duty job in its facility, but remanded for additional findings concerning claimant's post-injury wage-earning capacity. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996).

On remand, the administrative law judge consolidated the pending claim with a claim for a new injury that occurred in 1992 while claimant was working in the light duty position. The administrative law judge found that claimant had no loss in wage-earning capacity from the 1987 injury. With regard to the new injury, the administrative law judge, found that claimant is unable to return to the modified job, and that claimant was totally disabled from May 1992 until claimant became self-employed as of August 31, 1997. Thereafter, the administrative law judge found claimant entitled to permanent partial disability benefits. 33 U.S.C. §908(c)(21). Claimant filed a motion for reconsideration. The administrative law judge rejected claimant's contention that he is entitled to a nominal award for the 1987 injury.

The administrative law judge further stated that the 1992 "aggravation" is a new injury under the Act but that it arose out of the 1987 injury; "[t]hus, any present loss in wage earning capacity is a, product of the combination of the 1987 injury and the 1992 aggravation." Order on Recon. at 2. Claimant did not appeal these decisions.[1]

Claimant's counsel sought an attorney's fee of $14,984, plus expenses, for work performed before the Board in his initial appeal, to which employer objected. The Board denied the fee in its entirety, stating that claimant was unsuccessful on appeal.

In his motion for reconsideration, claimant contends that in denying a fee, the Board ignored the fact that the administrative law judge stated on reconsideration that claimant's present disability is due to both the 1987 injury and the 1992 aggravation thereof. Thus, claimant contends he was successful because, in effect he obtained concurrent awards for the two injuries; he alleges that the two injuries are interrelated such that he is entitled to the attorney's fee requested, citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

We reject claimant's contentions. Initially, we note that the Board and the Fifth Circuit affirmed the administrative law judge's finding that employer established suitable alternate employment at its facility. Moreover, on remand from the court the administrative law judge found that claimant has no loss in wage-earning capacity due to the

[1] The administrative law judge subsequently awarded claimant's counsel an attorney's fee of $21,800, plus expenses, after reducing the fee requested by 25 percent to reflect what he termed claimant's limited success. Claimant has appealed this fee award. BRB No. 99-0618.

1987 injury, and is not entitled to a nominal award for this injury. These findings were not appealed. The fact that the administrative law judge stated on reconsideration that the present loss in wage-earning capacity is due to both the 1987 and 1992 injuries does not make claimant successful for the period of time prior to the second injury, which is the only period of time in question for the attorney services performed before the Board. Prior to the second injury, the administrative law judge found that claimant was able to work at the modified job with no loss in wage-earning capacity. it is only since the 1992 "aggravation" (which is a "new" injury under the Act) that claimant is unable to work at the light duty job. Thus, that the two injuries may be anatomically related, based on the medical evidence of record, does not mean that claimant's economic disability, which is being compensated, is due to both injuries.

The cases cited by claimant for the proposition that an -inchoate right will entitle counsel to an attorney's fee are inapposite. These cases present the situation where the claimant would be entitled to benefits if not for the employer's credit of some kind. See, e.g., *E.P. Paup Co.* v. Director, OWCP, 999 F.2d 1341,27 BRBS 41(CRT) (9th Cir. 1993); Kinnes v. General Dynamics Corp., 25 BRBS 311 (1992). In this case, there is no entitlement to benefits, inchoate or otherwise, for the 1987 injury, and counsel therefore was unsuccessful on appeal to the Board. Furthermore, although *Hensley* permits a fee for interrelated claims, the claims here clearly are severable as the work performed before the Board represents time expended prior to the 1992 injury. See generally *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 26 BRBS 161(CRT) (D.C. Cir. 1991). inasmuch as claimant was unsuccessful in obtaining benefits for the 1987 injury by virtue of his appeals to the Board and the

Fifth Circuit, we affirm the Board's denial of an attorney's fee for work performed in BRB No. 92-1547.[2]

Accordingly, claimant's motion for reconsideration is denied. The Board's May 24, 1999 Order is affirmed.

SO ORDERED.

/S/ Betty Jean Hall

BE TTY JEAN HALL, Chief
Administrative Appeals Judge

/S/ James F. Brown

JAMES F. BROWN
Administrative Appeals Judge

/S/ Regina C. McGranery

REGINA C. McGRANERY
Administrative Appeals Judge

[2] We note that the Fifth Circuit summarily denied claimant's request for an attorney's fee for work performed before the court, as well as claimant's motion for reconsideration thereof.

## APPENDIX I

BEFORE THE UNITED STATES DEPARTMENT OF LABOR OFFICE OF WORKERS' COMPENSATION PROGRAMS
OWCP NO. 6-110624

RENE M. DARBY — CLAIMANT

VERSUS

INGALLS SHIPBUILDING, INC. — EMPLOYER
(A Self-Insured)

## OBJECTION TO MOTION FOR MODIFICATION

COMES NOW, the self-insured employer, Ingalls Shipbuilding, Inc., by and through its undersigned attorneys of record, and submits this, its Objection to Claimant's Petition for Modification of the judicial determination in connection with the above referenced claim and in objection to claimant's request for modification, the self-insured employer would submit as follows, to-wit:

I.

That the resolution of the above referenced claim on the merits was fully and finally reached with entry of the Administrative Law Judge's Order Denying Reconsideration which was entered on July 17, 1998. The Judge's decision effectively denied the claim for any additional permanent disability benefits due to the injury of September 24, 1987. Section 22 provides that a claimant

may apply for modification based upon a change of conditions within one year of the last payment of compensation or the denial of the claim. In the case at bar, the employer would submit that the claim for additional compensation was not filed until September 20, 1999. See correspondence with filing date attached hereto as Exhibit "A." Accordingly, the claim for additional compensation was not filed until more than one year after the denial of the claim for additional compensation. Therefore, the claim for additional compensation due to the 1987 injury should be summarily denied as untimely.

II.

That the claimant has failed to prove a change of conditions or a mistake of fact as required by § 22.

III.

That the medical attached to the claim for modification fails to establish a change of conditions or a mistake of fact.

Based upon the foregoing, and other grounds to be raised at a hearing hereon, the employer would assert that the claim for modification of the injury of September 24, 1987, should be denied.

Respectfully submitted, this the 13th day of October, 1999.

INGALLS SHIPBUILDING, INC.

BY: FRANKE, RAINEY & SALLOUM, PLLC

/S/ PAUL B. HOWELL

## APPENDIX J

### § 908. Compensation for disability

(f) Injury increasing disability:

(1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. If following an injury falling within the provisions of subsection (c)(l)-(20) of this section, the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer shall provide compensation for the applicable prescribed period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling within the provisions of subsection (13) of this section, the employer shall provide compensation for the lesser of such periods. In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under subsections (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only. If following an injury falling within the provisions of subsection (c)(l)-(20) of this section, the employee has a permanent partial disability and the disability is found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the

subsequent injury alone, the employer shall provide compensation for the applicable period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury failing within the provisions of subsection (c)(13) of this section, the employer shall provide compensation for the lesser of such periods.

In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide in addition to compensation under subsections (b) and (e) of this section, compensation for one hundred and four weeks only.

# APPENDIX K

## § 922. Modification of awards

Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

# APPENDIX L

## § 928. Fees for services

### (a) Attorney's fee; successful prosecution of claim

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the duty commissioner, on the ground that there is no liability for compensation within the provisions of this chapter, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.